Elias bin Mooin & Anor v Dato' Zainal Abidin bin Johari

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-22-90 OF 1995
JAMES FOONG J
2 MAY 1997

Civil Procedure *— Injunction — Damages — Application for — Application for extension of ex parte interlocutory injunction refused — Whether defendant was entitled to damages — Rules of the High Court 1980 O 3 r 2(2) & O 29 r 1(2B)*

Civil Procedure *— Injunction — Ex parte interlocutory injunction — Expiry of — Ex parte injunction to lapse after two weeks of its granting unless it is sooner revoked or set aside — Whether this should include an application to extend the injunction — When calculation of two weeks should begin — Rules of the High Court 1980 O 3 r 2(2) & O 29 r 1(2B)*

Civil Procedure *— Injunction — Damages — Undertaking of damages — Omission to insert plaintiffs' undertaking to pay damages in ex parte injunction order — Whether this was fatal to a claim for damages — Whether express undertaking affirmed on the plaintiffs' affidavit was sufficient to bind the plaintiffs to pay damages when so ordered*

The plaintiffs obtained an ex parte interlocutory injunction ('the ex parte injunction') against the defendant on 17 March 1995. On 30 March 1995, the plaintiffs filed an application, inter partes, to extend the ex parte injunction until the date of hearing of the case proper. The application came before the court on 31 March 1995 and was adjourned to 10 April 1995. On that date, the application was dismissed and the judge announced that the issue of damages would be dealt with later. Before this court, the defendant claimed that since the application for extension was refused, on the undertaking of the plaintiffs' affidavit, the former was entitled to damages.

The plaintiffs argued otherwise by stating that by virtue of O 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC'), the ex parte injunction had automatically expired on 30 March 1995 and thus there was no injunction to decide on 10 April 1995 and no question of damages arose. The defendant disagreed and claimed that under O 3 r 2(2) of the RHC, the expiry date should be 31 March 1995. He further submitted that under O 29 r 1(2B), the ex parte injunction would lapse after two weeks of its granting unless it is sooner revoked or set aside — this should include 'unless otherwise extended', which the plaintiffs did. By reason that this act of extension was required to be done, the calculation of two weeks should begin after 17 March 1995 — this would end on 31 March 1995, by which time the ex parte injunction was heard and implied to be extended.

Further to this, the plaintiffs contended that the ex parte injunction did not specify their undertaking to pay any damages. The issues pertained to the date of expiry of the ex parte injunction and whether it was fatal to the defendant's claim if no undertaking to pay damages was provided for in the order for ex parte injunction.

Held, dismissing the application for damages with costs:

(1) Order 3 r 2(2) of the RHC reveals a pre-condition that there must be an act which is required to be done within a specific period or from a specific date. According to O 29 r 1(2B) of the RHC, the particular provision where the subject matter arose, the only acts required to be performed are the revocation or setting aside of the interim injunction. There is no expression to include 'unless otherwise extended'. When the plaintiffs made an application for extension of this ex parte injunction, for all intent and purpose, it must be considered a fresh application for an interim injunction on an inter partes basis. This no longer came within the ambit of O 29 r 1(2B) of the RHC, which only provides for ex parte application. Under such circumstances, there could not even be an implied condition read into this distinct rule of an act to allow the plaintiffs to apply for an extension of the ex parte injunction. Without any requirement of an act 'to be done within a specific period after or from a specific date' under the provision of O 29 r 1(2B) of the RHC, the period submitted for calculation by the defendant was thus rejected.

Therefore, by the calculation specified under O 42 r 7(1) and (2) read together with O 29 r 1(2B) of the RHC, the ex parte injunction expired within two weeks from the date it was granted, ie 30 March 1995. Consequently, without the ex parte injunction order then in existence, there could be no issue on damages since the ex parte injunction order had automatically lapsed without any challenge by the defendant.

Moreover, the defendant without putting forward any application to revoke or set aside the ex parte injunction within the period of two weeks upon its granting must have accepted that the ex parte interim injunction was properly taken out. This being the case, he must be excluded from claiming damages for the period when it existed (see pp 364D–I and 365A–B); *Lees v Patterson* (1877–78) 7 Ch D 866 followed.

(2) A non-insertion of the plaintiffs' undertaking to pay damages in the ex parte injunction order is not fatal to a claim for damages. Although such undertaking should be incorporated and forms part of the order, a failure to include does not prevent the defendant from claiming on an express undertaking affirmed on the plaintiffs' affidavit, as the affidavit itself is sufficient to bind the plaintiffs to pay damages when so ordered. But in the circumstances of this case, and based on the ruling on the first issue, the finding on damages was academic (see p 365C–E).

[Bahasa Malaysia summary

Pihak plaintif telah mendapatkan satu injunksi interlokutori ex parte ('injunksi ex parte tersebut') terhadap defendan pada 17 Mac 1995. Pada 30 Mac 1995, pihak plaintif telah memfailkan satu permohonan,

A inter partes, untuk melanjutkan injunksi ex parte tersebut sehingga tarikh perbicaraan kes yang sebenar. Permohonan ini telah dihadapkan ke mahkamah pada 31 Mac 1995 dan telah ditangguhkan kepada 10 April 1995. Pada tarikh itu, permohonan tersebut telah ditolak dan hakim telah mengumumkan bahawa isu mengenai ganti rugi akan diuruskan kemudian. Di hadapan mahkamah ini, defendan B telah menuntut bahawa memandangkan permohonan untuk lanjutan telah ditolak, atas akujanji afidavit plaintif, defendan berhak mendapat ganti rugi.

Plaintif menghujahkan sebaliknya dengan menyatakan bahawa disebabkan A 29 k 1(2B) Kaedah-Kaedah Mahkamah Tinggi 1980 C ('KMT'), injunksi ex parte telah luput secara automatik pada 30 Mac 1995 dan justeru itu tiada injunksi untuk ditentukan pada 10 April 1995 dan tiada persoalan ganti rugi telah timbul. Defendan tidak bersetuju dan menuntut bahawa di bawah A 3 k 2(2) KMT, tarikh habis tempoh seharusnya adalah pada 31 Mac 1995. Dia selanjutnya D menghujahkan bahawa di bawah A 29 k 1(2B), injunksi ex parte akan luput dua minggu selepas diberikan melainkan ia dibatalkan atau diketepikan lebih awal — ini seharusnya termasuk 'melainkan dilanjutkan sebaliknya', yang telah pun dilakukan oleh plaintif. Oleh kerana perbuatan pelanjutan perlu dilakukan, pengiraan dua minggu harus bermula selepas 17 Mac 1995 — ini akan berakhir pada 31 Mac E 1995, apabila injunksi ex parte didengar dan disiratkan telah dilanjutkan.

Seterusnya, plaintif menghujahkan bahawa injunksi ex parte tidak menetapkan akujanji mereka untuk membayar apa-apa ganti rugi. Isu-isu yang berhubung dengan tarikh habis tempoh injunksi ex parte dan sama ada ia adalah padah kepada tuntutan defendan jika F tiada akujanji untuk membayar ganti rugi diperuntukkan dalam perintah injunksi ex parte.

Pihak plaintif mempertikaikan perkara ini dengan menyatakan bahawa mengikut A 29 k 1(2B) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), injunksi ex parte tersebut telah luput secara sendirinya G pada 30 Mac 1995 dan oleh itu tiada injunksi yang perlu diputuskan pada 10 April 1995 dan persoalan ganti rugi tidak timbul. Defendan telah tidak bersetuju dan mendakwa bahawa di bawah A 3 k 2(2) KMT, tarikh luput injunksi ex parte tersebut adalah pada 31 Mac 1995. Tambahan lagi, pihak plaintif telah menyatakan bahawa injunksi ex parte tersebut tidak menjelaskan akujanji mereka untuk membayar H ganti rugi. Persoalan di hadapan mahkamah sekarang adalah bilakah tarikh sebenar injunksi ex parte tersebut luput dan sama ada dengan ketiadaan peruntukan akujanji membayar ganti rugi di dalam perintah injunksi ex parte tersebut adalah padah kepada tuntutan defendan.

I **Diputuskan**, menolak permohonan untuk ganti rugi dengan kos:

(1) Aturan 3 k 2(2) KMT menunjukkan satu prasyarat bahawa mesti terdapat suatu perbuatan yang perlu dilakukan dalam jangkamasa yang tertentu atau dari tarikh yang tertentu. Menurut A 29 k 1(2B) KMT, peruntukan tertentu di mana isi perkara

timbul, cuma apa yang perlu dilakukan adalah pembatalan atau penepian injunksi interim. Tiada ungkapan yang termasuk 'melainkan dilanjutkan sebaliknya'. Apabila plaintif membuat permohonan bagi pelanjutan injunksi ex parte ini,untuk semua tujuan, ia mestilah dianggap sebagai permohonan baru untuk satu injunksi interim pada dasar inter partes. Ini tidak lagi dirangkumi oleh A 29 k 1(2B) KMT, yang hanya memperuntukkan permohonan ex parte. Di bawah keadaan sedemikian, tidak mungkin terdapat syarat tersirat yang dibaca atas rukun nyata ini mengenai perbuatan yang membenarkan plaintif memohon pelanjutan injunksi ex parte. Tanpa keperluan untuk satu perbuatan 'dilakukan dalam tempoh tertentu selepas atau dari suatu tarikh tertentu' di bawah peruntukan A 29 r 1(2B) KMT, jangkamasa yang dikemukakan untuk pengiraan oleh defendan dengan itu ditolak.

Maka, mengikut pengiraan yang ditetapkan di bawah A 42 k 7(1) dan (2) dibaca bersama dengan A 29 k 1(2B) KMT, injunksi ex parte tersebut telah luput dalam masa dua minggu dari tarikh ia diberi, iaitu 30 Mac 1995. Akibatnya, tanpa perintah injunksi ex parte yang wujud pada masa itu, tidak mungkin adanya isu atas ganti rugi kerana perintah injunksi ex parte telah luput secara automatik tanpa sebarang cabaran oleh defendan.

Tambahan lagi, memandangkan defendan tidak mengemukakan sebarang permohonan untuk membatalkan atau mengetepikan injunksi ex parte tersebut dalam tempoh dua minggu selepas diberikan boleh dibuat andaian bahawa injunksi interim ex parte tersebut telah diterima dan dilaksanakan dengan sempurna. Oleh yang demikian, defendan hendaklah dihalang daripada menuntut ganti rugi selama mana injunksi itu wujud (lihat ms 364D–I dan 365A–B); *Lees v Patterson* [1878] Ch 866 diikut.

(2) Ketidakmasukan akujanji plaintif untuk membayar ganti rugi dalam perintah injunksi ex parte tersebut tidak membawa padah kepada tuntutan ganti rugi. Walaupun akujanji sedemikian harus digabungkan dan membentuk sebahagian daripada perintah, kegagalan untuk memasukkannya tidak menghalang defendan daripada menuntut atas akujanji nyata yang diikrarkan atas afidavit plaintif, kerana afidavit dengan sendirinya memadai untuk mengikat plaintif supaya membayar ganti rugi apabila diperintah berbuat demikian. Tetapi dalam keadaan kes ini, dan berdasarkan penghakiman atas isu pertama, keputusan mengenai ganti rugi adalah akademik (lihat ms 365C–E).]

Notes

For cases on damages in matters relating to an injunction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1434–1436.

For cases on ex parte interlocutory injunction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1463–1464, 1467–1468, 1508–1534 and 1564–1611.

Case referred to

Lees v Patterson (1877–78) 7 Ch D 866 (folld)

Legislation referred to

Rules of the High Court 1980 O 3 r 2(2), O 29 r 1(2B), O 42 r 7(1), (2), Form 58

D Kalaimany (*Nageswary* with him) (*Kalai & Partners*) for the plaintiffs.
Hj Sulaiman (*Anita Sockalingam* with him) (*Zain & Co*) for the defendant.

James Foong J: On 17 March 1995, the plaintiffs obtained an ex parte interlocutory injunction ('the ex parte injunction') to, inter alia, restrain the defendant from participating in the activities of the ex-servicemen association. On 30 March 1995, the plaintiffs filed an application by way of summons-in-chambers, inter partes, to extend the interim injunction so granted until the date of hearing of the case proper. This application came before Mokhtar Sidin J (as he then was) on 31 March 1995 where both parties were represented. The hearing was adjourned to 10 April 1995. Here, counsel for both parties informed this court that no formal records are available to determine whether the said judge extended the ex parte injunction up to the adjourned date of 10 April 1995. On 10 April 1995, the said judge heard arguments and refused the plaintiffs' application for extension. On consequential orders, such as the issue of damages, Hj Sulaiman, counsel for the defendant revealed that the said judge had announced that 'he will deal with this later'. Since the judge was elevated to the Court of Appeal, this court is left to determine this issue on damages.

The defendant claimed that since the plaintiffs' application to extend the ex parte injunction was refused, they were entitled to damages on the undertaking of the plaintiffs to pay damages under para 11 of their affidavit (encl 3).

The plaintiffs disagreed on two grounds. Firstly, the ex parte injunction automatically expired on 30 March 1995. Thus, when the said judge heard the application for extension on 10 April 1995, there was no longer an ex parte injunction for him to decide. Without the existence of the ex parte injunction on the date of the hearing of its extension, there can be no question of damages arising, even though the application for extension of the ex parte injunction was dismissed. Secondly, the ex parte injunction order (encl 5) did not specify the plaintiffs' undertaking to pay any damages to the defendant.

The first ground involves O 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC'), which provides:

> Unless sooner revoked or set aside, an interim injunction obtained on an ex parte application shall be automatically lapsed at the end of two weeks from the date on which it is granted.

According to Mr Kalai, counsel for the plaintiffs, the 'two weeks' which is 14 days, ends on 30 March 1995. This is with the inclusion of the date

(17 March 1995) when the ex parte injunction was granted. This form of calculation is provided for under O 42 r 7(1) and (2) of the RHC which reads: A

> (1) A judgment or order of the Court takes effect from the day of its date.
>
> (2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, ...

B

Hj Sulaiman, however, disagreed and insisted that the ex parte injunction only lapsed on 31 March 1995. He relied on O 3 r 2(2) of the RHC, which states:

> Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

He argued that under O 29 r 1(2B), the ex parte injunction would lapse after two weeks of its granting unless it is sooner revoked or set aside — this should include 'unless otherwise extended', which the plaintiffs did. By reason that this act of extension is required to be done, the calculation of two weeks should begin after 17 March 1995 — this would end on 31 March 1995, by which time the ex parte injunction was heard and implied to be extended. C D

A careful perusal of O 3 r 2(2) of the RHC reveals a pre-condition that there must be an act which is required to be done within a specific period or from a specific date. But what is this act which is required to be performed? To determine this, one must obviously return to O 29 r 1(2B) of the RHC, for this is the particular provision where the subject matter arose. The only acts expressed under this rule are 'revoked' or 'set aside'. There is no expression to include 'unless otherwise extended'. In fact, this rule should not accommodate such situation. It is meant specifically for circumstances of extreme urgency where inter partes hearing cannot be accommodated. Being of an ex parte nature, it has a short lifespan of only two weeks from the date it was granted. Even this could be shortened when the court revoke or set it aside on an application by the defendant. When the plaintiffs made an application for extension of this ex parte injunction, for all intent and purpose, it must be considered a fresh application for an interim injunction on an inter partes basis. This no longer comes within the ambit of O 29 r 1(2B) of the RHC, which only provides for ex parte application. In fact, even the legal principles to be applicable for consideration in an application for ex parte injunction and that of an inter partes are different. Under such circumstances, there cannot even be an implied condition read into this distinct rule of an act to allow the plaintiffs to apply for an extension of the ex parte injunction. Without any requirement of an act 'to be done within a specific period after or from a specific date' under the provision of O 29 r 1(2B) of the RHC, the period submitted for calculation by the defendant is thus rejected by this court. E F G H

By the calculation specified under O 42 r 7(1) and (2) of the RHC read together with O 29 r 1(2B) of the RHC, the ex parte injunction terminated on 30 March 1995. Thus, when the said judge ordered the application for extension to be struck off on 10 April 1995, there was in fact no order to be affected upon. Consequently, without the ex parte I

injunction order then in existence, there can be no issue on damages since the ex parte injunction order had automatically lapsed without any challenge by the defendant. The defendant without putting forward any application to revoke or set aside this ex parte injunction within the period of two weeks upon its granting must have accepted that this ex parte interim injunction was properly taken out. When this is so, he must be excluded from claiming damages for the period when it existed. This proposition finds support in the case of *Lees v Patterson* (1877–78) 7 Ch D 866 where it was held that the defendant was not entitled to any damages when he was arrested on an improperly obtained writ of *ne exeat* but had not moved to discharge it, thus the writ must be taken to have been properly issued.

On the second issue of the missing provision of the plaintiffs' undertaking to pay damages in the order for the ex parte injunction, this court finds that the non-insertion of this undertaking is not fatal to the defendant's claim for damages. Although such undertaking should be incorporated and forms part of the order as disclosed in Form 58 of the RHC, a failure to include does not prevent the defendant from claiming on an express undertaking affirmed on the plaintiffs' affidavit, as in this case. When a judge makes an order for an interim injunction, one relevant factor taken into consideration is the undertaking by the plaintiffs to pay damages. Though this may not be written into the order, the affidavit itself is sufficient to bind the plaintiff to pay damages when so ordered. But in the circumstances of this case, and based on the ruling on the first issue, this finding on damages becomes academic.

For the reasons aforesaid, the application for damages by the defendant must be dismissed with costs.

Application dismissed.

Reported by Zahid Taib